



A New Day for the Civil Service

Recent Rulings of the MSPB and How They Impact Employee Relations

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Presenters

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Partnership and Labor Relations

Employee Accountability (EA)



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What we do

- EA reviews 7,000+ MSPB initial and Board decisions every year
- Provide advice and guidance to agency officials
- Formulate, implement, and evaluate policies impacting performance and conduct based actions

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What we do

- Intervention and Reconsideration:
 - Request by agencies who think initial or Board decision was erroneous
 - Collaborate with OPM Office of General Counsel before formal intervention
 - Can seek reversal or modification of:
 - Initial Decisions
 - Board Decisions
 - Federal Circuit decisions
 - Arbitration awards

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Intervention and Reconsideration

- Legal authority:
- 5 U.S.C. 7701 (d)
 - (A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and
 - (B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a **substantial impact** on any civil service law, rule, or regulation under the jurisdiction of the Office;

Intervention and Reconsideration



- Additional Legal authorities:
- 5 U.S.C. 7701 (e) — petition for review
- 5 U.S.C. 7703 (d) — Federal Circuit
- 5 U.S.C. 7721 (f) — arbitration awards

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Third-party Adjudications

- Major factors for intervention and reconsideration include:
 - Degree to which a decision constitutes a serious misinterpretation of a civil service law, rule, or regulation
 - Potential impact of the decision on governmentwide personnel management
 - The extent to which relevant, established MSPB decisions have already addressed issues in the case
 - The timeliness in which the case is presented to OPM:
 - Intervention (MSPB): 30 days
 - Reconsideration (Federal Circuit): 60 days

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MSPB Jurisdiction

- **Original Jurisdiction:**

- Actions brought by the Special Counsel under 5 U.S.C. §§ 1214-1216 (Prohibited Personnel Practices);
- Requests for informal hearings by persons removed from the Senior Executive Service for performance deficiencies;
- Actions taken against administrative law judges under 5 U.S.C. § 7521.

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MSPB Jurisdiction

- **Appellate Jurisdiction:**
 - Reduction in grade or removal for unacceptable performance (5 C.F.R. part 432; 5 U.S.C. § 4303(e));
 - Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 C.F.R. § 531.410; 5 U.S.C. § 5335(c));
 - Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. (5 C.F.R. part 752, subparts C and D; 5 U.S.C. § 7511-7514);

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MSPB Jurisdiction

- **Appellate Jurisdiction (cont.):**
 - Negative suitability determination (5 C.F.R. § 731.501);
 - Termination of appointment during a managerial or supervisory probationary period when the employee alleges discrimination because of partisan political affiliation or marital status (5 C.F.R. § 315.908(b));
 - Failure to restore to duty from Uniformed Service or compensable injury (5 C.F.R. Part 353);

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MSPB Jurisdiction

- **Appellate Jurisdiction (cont.):**
 - Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 C.F.R. § 351.901);
 - Reduction-in-force actions affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. § 4010a);

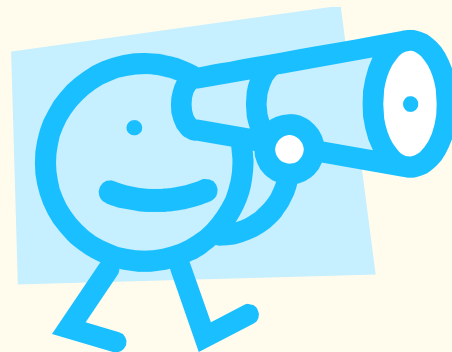
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MSPB Jurisdiction

- **Appellate Jurisdiction (cont.):**
 - Appeals under the Uniformed Services Employment and Reemployment Rights Act (codified at 38 U.S.C. §§ 4301-4333);
 - Appeals under the Veterans Employment Opportunities Act (38 U.S.C. § 4324); and
 - Appeals involving an allegation that the action was based on the appellant's "whistleblowing" (5 U.S.C. §§ 2302(b)(8), 1221(a)).

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Let's take a look at some cases!



National Security

- Conyers, Northover v. Department of Defense (2010, MSPB 247, 248)
- Gonzalez v. Department of homeland Security (2010, MSPB 132)



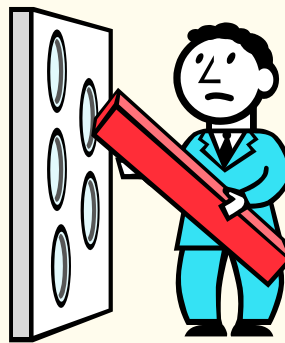
Probationary Jurisdiction

- Sandoval v. Department of Agriculture (2010, MSPB 197)
- Smirne v. Department of the Army (2010, MSPB 188)



Performance Removals

- Henderson v. NASA (2011, MSPB 12)
- Lee v. Environmental Protection Agency (2010, MSPB 240)



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Adverse Actions

- Ward v. Postal Service (*Fed. Cir. 2011, WL 537856*)
- Lewis v. Department of Veterans Affairs (*2010, MSPB 98*)

Veteran's Issues

VEOA:

- Dean v. OPM, Evans v. Department of Veterans Affairs (*2010, MSPB 213*)

USERRA:

- Erickson v. Postal Service (*Fed. Cir. 2010, WL 677850*)



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Suitability

- Aguzie, Barnes v. OPM (2011, MSPB 10)
- Hunt-O'Neal v. OPM (2011, MSPB 33)

Whistleblower

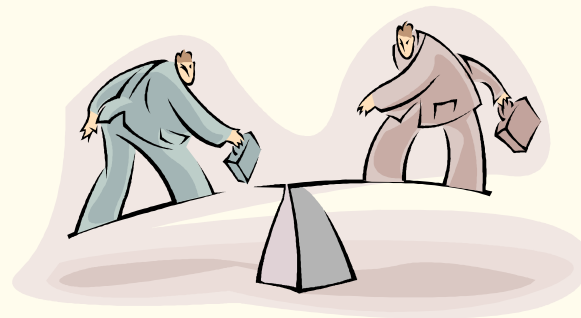
- Chambers v. Department of the Interior (2011, MSPB 7)
- Parikh v. HHS (2011, MSPB 1)



Office of Special Counsel

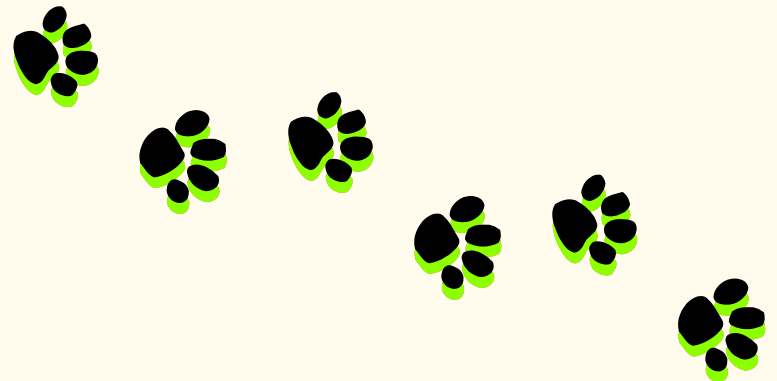
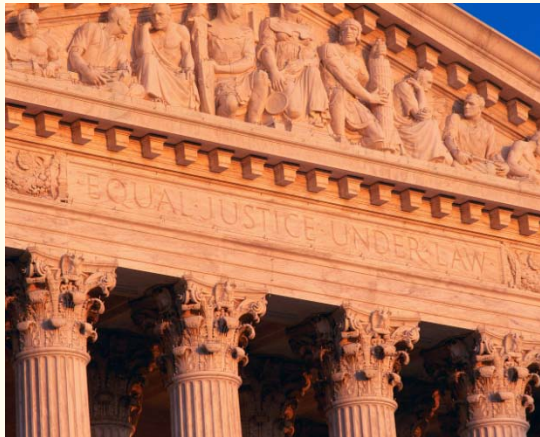
Prohibited Personnel Practices:

- Lee, Beatrez v. Office of Special Counsel
(2010 MSPB 89)



Supreme Court Cases

- Staub v. Proctor Hospital (2011, Sup. Ct., No. 09-400)
- NASA v. Nelson (2011, Sup. Ct., No. 09-530)



Questions and Answers

Thank you for attending!

